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Supreme Court, U.S.
FILED
MAY 21 2001
OFFICE OF THE CLERK

No. 00-1611
IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL RICHARDSON,
Petitioner,

v.

GARY L. JOHNSON, Director
Texas Department of Criminal Justice,
Institutional Division,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

IMMINENT EXECUTION SCHEDULED
FOR 6:00 PM JUNE 26, 2001

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I. PETITIONER HAS NEVER WAIVED HIS *PENRY* CLAIMS

Petitioner Richardson's principal argument before this Court is that the Texas court's failure to provide adequate mitigation instructions violated his rights under *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), because it deprived the sentencing jury of the means to give full weight to all constitutionally relevant mitigating evidence -- both evidence that was already in the trial record and evidence that trial counsel was prevented from developing by his knowledge that such an instruction would not be given. This *Penry* claim has been fully raised, briefed, and argued throughout all stages of this litigation.

Respondent erroneously argues (Respondent's Brief in Opposition "Resp. Br." at 22-24) that the portion of the petition which develops this issue in relation to the evidence actually presented at trial (*see* Petition for a Writ of Certiorari at 17-19) "is not properly before the Court" because the Fifth Circuit did not expressly deal with it in its eight page decision denying a certificate of appealability. (App. 1-12) There was no such waiver of that portion of Petitioner's argument.

Respondent concedes that, even in the Fifth Circuit, Mr. Richardson did argue -- as fully presented in his habeas petition (*see* App. 55-92) -- that the absence of a mitigation instruction precluded the jury from considering the mitigating evidence already in the record. (Resp. Br. at 22-23) Respondent's attempt to split Mr. Richardson's *Penry* argument into two separate issues does not fairly characterize the issue presented to this Court. Mr. Richardson has consistently argued that the absence of a mitigation instruction both prevented the

jury from considering the evidence already presented at his trial and precluded his counsel from presenting additional, constitutionally relevant mitigating evidence. The inability of the jury to give effect to mitigating evidence due to the trial court's failure to give a mitigation instruction renders Mr. Richardson's death sentence unconstitutional under *Penry I*. Mr. Richardson's singular claim that his death sentence violates *Penry I* was argued and decided below, and to properly before this Court.[1/]

1/ In addition, footnote 4 of Respondent's brief (p. 17) misrepresents Mr. Richardson's arguments, the holding of *Penry I* and the issue now pending before this Court in *Penry* v. *Johnson*, 121 S.Ct. 563 (2001) (granting *certiorari*) ("*Penry II*"). *Penry I* held that the Texas statutory scheme did not allow the jury to give full effect to the mitigating evidence presented. It did not endorse a specific instruction. In *Penry II*, petitioner argued that the trial court's attempt to comply with *Penry I* at Penry's second trial failed. The instructions proffered by Mr. Richardson's counsel were entirely dissimilar from the instruction at issue in *Penry II*, which was constitutionally flawed because it tied the jury's ability to give effect to mitigating evidence to the three special issues. The instructions proffered by Mr. Richardson's counsel were similar to those contemplated by this Court when it decided *Penry I*, which are now required by statute in all capital cases.

II. RESPONDENT MISCHARACTERIZES THE RECORD EVIDENCE

A. Richardson's Trial Counsel Testified that He Was Chilled from Developing Evidence Regarding Richardson's Abusive Childhood Because He Knew He Would Not Receive a Relevant Mitigation Instruction

Respondent distorts the record evidence from the state *habeas* hearing to suggest that trial counsel, Mr. Cazier, was not deterred from presenting or developing evidence relating to Richardson's history of childhood abuse. (Resp. Br. at 17)

Mr. Cazier testified that he had ample reason to believe that his proposed mitigation instructions would be denied. (App. 382) Though Mr. Cazier requested a mitigation instruction in five separate forms, he "thought it was unlikely that [the trial court] would grant those instructions." (App. 382) Mr. Cazier knew of only one case in which a similar instruction had been given -- and that case was presided over by a different judge. (App. 382-83) In all other cases, to Mr. Cazier's knowledge, similar requests had been denied. (App. 382-83) Mr. Cazier did not know if a similar instruction had been requested in the one death penalty case over which the trial judge had presided before Mr. Richardson's trial. (Supplemental Appendix ("Supp. App.") 28) He did know, however, that none had been given. (*See* Supp. App. 382) Mr. Cazier thus acted on the belief that the trial court would deny his requested instructions -- and he was correct.

Mr. Cazier also knew that the state's designated psychiatric witness, Dr. Grigson, routinely testified that capital

defendants suffered from "antisocial personality conduct disorder." (App. 385) Mr. Cazier believed that Dr. Grigson "would testify that child abuse was a predisposing factor, or one of the diagnostic criteria for, antisocial personality disorder." (App. 385) He legitimately feared that, without an instruction allowing the jury to give independent mitigating weight to the evidence, evidence of defendant's physical and sexual abuse as a child "would only support Dr. Grigson's diagnosis." (App. 386)

It was for these reasons, Mr. Cazier testified, that he did not investigate potential mitigating evidence that could be used to support Dr. Grigson's diagnosis:

> Well, in anticipation of the probable testimony of Dr. Grigson, I really didn't want to seek out and find any evidence that would corroborate his hypothetical diagnosis. I didn't ask about child abuse. I didn't go into it.

(App. 390) (*See also* App. 386) ("And for that reason, we didn't pursue that area.")

Respondent's suggestion that Mr. Cazier "didn't make [the] choice" not to pursue evidence of child abuse (*see* Resp. Br. at 17) is a gross distortion of the record evidence. At the hearing, Respondent questioned Mr. Cazier as to whether, *if* he had been given the choice between the two theories of defense *and* the benefit of a *Penry*-type instruction, he would have chosen to present evidence of a normal loving upbringing (in order to humanize the defendant), or to present evidence of child abuse. (Supp. App. 32-33) Mr. Cazier testified that he did not know, "in light of *Penry*," which theory he would choose. (Supp. App. 33; *see also* Supp. App. 36) Mr. Cazier testified,

in the passage cited by Respondents, that was the choice which he did not have at the time of trial. As Mr. Cazier clarified:

> Q: And is it true by extension you didn't know about the child abuse at least in part because you didn't investigate it because it was not something you felt could possibly help your client?
>
> A: That's true.
>
> Q: And, in fact, it might very much harm your client?
>
> A: I thought that it would.

(Supp. App. 38)

Mr. Cazier avoided learning of any child abuse evidence because he rightfully feared that the jury would not be provided with an instruction by which it could give that evidence mitigating effect. As he testified, "I wasn't looking for [evidence of child abuse]. I didn't ask. I didn't want to know." (Supp. App. 37)

B. Dr. Eubanks' Testimony Established a Constitutionally Sufficient Nexus Between the Mitigating Evidence and the Crime

Respondent similarly distorts the testimony of Dr. Joseph Eubanks at the state *habeas* hearing. Respondent asserts that Dr. Eubanks testified that he could not establish a nexus between Mr. Richardson's history of child abuse and the crime he was convicted of committing. Dr. Eubanks said no

such thing. Rather, he testified that childhood abuse could have significant, deleterious effects on a person's behavior later in life, and that Mr. Richardson's actions "might have sprung from genetic and environmental factors," such as a history of child abuse. (Supp. App. 26)

While Dr. Eubanks neither examined Mr. Richardson nor investigated the circumstances of the crime, he testified that, had he been presented with the child abuse evidence at the time of Mr. Richardson's trial, with proper investigation and examination, he might well have determined that a "strong correlation" or "nexus" existed between a history of childhood abuse and acts committed later in life. (*See* Supp. App. 12-14) However, absent an examination of Mr. Richardson he could not draw such a conclusion at the time of the state *habeas* hearing fifteen years later. This is precisely the basis of Mr. Richardson's argument: had the trial court given a mitigation instruction, allowing trial counsel to develop the child abuse evidence, an expert witness such as Dr. Eubanks would have had the opportunity to examine Mr. Richardson and testify to a nexus between his abusive background and the crime.

Dr. Eubanks' testimony is replete with evidence from which a jury -- had it been given the opportunity to do so -- could have found a constitutionally relevant connection between Mr. Richardson's history of childhood physical and sexual abuse and his culpability for the crime. Among other things, Dr. Eubanks testified that:

- The likely effects, in later life, of a history of child abuse are "very widespread, going anywhere from withdrawal and depression, social isolation, to very violent acting out behavior," and might "certainly"

result in criminal acts and "physical acting out" in acts of violence. (Supp. App. 4-5)

- A person with a history of child abuse is likely to respond differently to a stressful situation than a person who had not suffered such abuse. This reaction might include lashing out, acting impulsively, and reacting violently. (Supp. App. 13-14)

- A history of child abuse "certainly could have great effects on a person's behavior." (Supp. App. 18)

- Mr Richardson "could have been predisposed because of his environmental and possible genetic variables to have engaged in activities which would lead to horrendous crimes." (Supp. App. 21-22)

This Court has repeatedly held that evidence of a defendant's troubled background, including factors such as emotional or mental problems and child abuse, can be constitutionally relevant mitigating factors. *See Penry I*, 492 U.S. at 319; *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *Eddings* v. *Oklahoma*, 455 U.S. 104, 113-115 (1982). Evidence of an abusive childhood is relevant to the jury's duty to treat a capital defendant as a "uniquely individual human being" and make a "reasoned moral response" regarding punishment. *See Penry I*, 492 U.S. at 319 (internal quotations omitted and emphasis omitted). Dr. Eubanks' testimony simply confirms that recognition by showing that, had defense counsel been free to develop such evidence, the facts of Mr. Richardson's abusive childhood could have been used by the jury as a reasoned moral basis for deciding upon a sentence less than death.

III. CONCLUSION

For the foregoing reasons, and for those previously stated, Petitioner respectfully requests that this Court issue a writ of *certiorari*.

Dated: May 21, 2001

Respectfully submitted,
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